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UNITED STATES SENATE COMMITTEE ON INDIAN AFFAIRS
OVERSIGHT HEARING ON THE U.S. JUSTICE DEPARTMENT OPINION ON
INTERNET GAMING: WHAT IS AT STAKE FOR TRIBES

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Chairman Akaka, members of the Committee, it is a pleasure to testify today on the important issue of Internet gaming and I thank you for inviting me to this hearing. It is an important issue because Internet gaming is already by some estimates, a \$30 billion industry worldwide and it has been estimated that \$6 to \$7 billion of that come from gamblers residing within the United States. If it is legalized in this Country, it could very well be the next big thing in gaming and there is no reason why Indian tribes should be left out of this economic development opportunity.

My testimony will focus on “what is at stake for tribes” and not on the Justice Department’s opinion concerning the scope of the Wire Act. I tend to agree with that opinion and leave to others the task of casting a critical eye on its reasoning. Instead, I want to focus my testimony on “what is at stake for tribes.”

First, I want to emphasize why, if general legislation legalizing and regulating internet gaming is enacted, the special issues and concerns facing Indian tribes should be addressed.

Secondly, while I do believe that it might not be politically wise to amend IGRA in order to address the special problems facing tribal internet gaming, I also believe that any legislation addressing such internet gaming should respect the essential bargain that was struck in IGRA between the interests of the tribes, the states, and the federal government.

Finally, I will make some suggestions about how Internet Gaming should be regulated when it comes to Indian tribes.

1. THE NEED TO SPECIFICALLY ADDRESS THE SPECIAL ISSUES
FACING INDIAN TRIBES AND INTERNET GAMING

The major reason to specifically address the issues facing Indian internet gaming is that without some specific legislation, Internet gaming would be controlled by the Indian Gaming Regulatory Act. IGRA divides gaming into three classes. Since Internet gaming is not included in either Class I or II gaming activities, it would automatically be included in Class III. Class III is regulated pursuant to Tribal State Compacts. Of course, a very good argument can be made that under current law, internet gaming is authorized under some existing compacts. Under that argument, “internet” gaming would not be considered to be a “new form” of gaming under existing compacts. Under that view, if the compact allowed electronic blackjack for instance to be played in a tribal

casino, that game would be automatically authorized as an internet game. In the event that states or others may not agree with this position, perhaps any legislation legalizing internet gaming generally should have a provision stating that any internet game that is otherwise authorized as a non-internet game in a tribal state compact would be deemed authorized under federal law.

The major problem here is that while Internet gaming, if otherwise legal under federal law and within the state where the reservation is located, may be legal for some tribes under their tribal state compacts, it may not be an authorized form of gaming for many others. This would mean that for many tribes, internet gaming would not be authorized unless they could persuade the states to amend their compacts. This would be an uphill battle and an unlikely scenario for many tribes because the Supreme Court in *Seminole Tribe v. Florida* struck down a key component of IGRA which allowed tribes to sue states in federal court if the states failed to negotiate a compact in good faith. As a result of this Supreme Court's decision, IGRA no longer strikes the appropriate balance between tribal and state interests that Congress had worked so hard to achieve when the legislation was first enacted. Therefore, unless IGRA is amended to restore such appropriate balance between tribal and state interests, I do not believe that internet gaming, if found not to be authorized under a compact, should be regulated as a Class III game or subject to a tribal state compact.

Such a *Seminole* fix would be very simple to achieve but probably very complicated politically. The Congress would just have to declare that tribes could sue state officials who failed to negotiate in good faith under the doctrine of *Ex Parte Young*. It would be a simple and elegant solution that would not disturb the constitutional part of the Supreme Court decision.

Even for those tribes where internet gaming would be already legal, the problem is that IGRA is very land specific. It is based on a physical and geographical concept of sovereignty. This is why IGRA limits itself to gaming on "Indian lands" and contains a very specific definition of what are "Indian lands" for the purposes of IGRA. Thus some may make the argument that even if arguably authorized under a compact, Indian tribes should only be able to offer internet gaming to people located on Indian land. Such a limitation would be ludicrous and incompatible with the very nature of the internet. The internet is not land based. It does not have geographical boundaries. It is to a great extent, borderless. Indian tribes should be able to handle wagering from any customer located in a state that allows internet gaming.

Many people think that archaic conceptions of land based sovereignty are ill adapted to regulation of the Internet. In any case, for the following reasons, Tribes should be able to extend their economic opportunities as sovereigns beyond the reservation borders.

First, one has to look at the historical context behind the creation and location of Indian reservations. Indian tribes used to own the whole country, and at least initially were able to reserve substantial amount of lands for themselves in the early treaties. Later on, however, after first being removed to out of the way and distant places, many tribes saw their treaty land base reduced as a result of warfare, and unilateral abrogation by the United States. Finally, the tribes lost around 90 million acres through the allotment process, which also resulted in a large influx of non-Indians within the reservations. Indian reservations during the removal and later periods were never created with Indian economic development in mind. Quite the contrary, their location was selected, and their size reduced so that non-Indians could proceed with economic development on land previously owned by the tribes.

Second, it has to be understood that, when it comes to economic development, Indian tribes are not just acting as businesses to make money for their shareholders when venturing beyond their reservations. They are in the process of raising governmental revenues because they do not have a tax base on the reservation. They lack such tax base because the Supreme Court has severely curtailed their power to tax non-members, while at the same time allowing state taxation of non-Indians, and Indian land held in fee, located within reservations. In addition, the tribes cannot tax land held in trust by the United States for individual tribal members.

Third, the concept of territorial sovereignty, both in the United States and abroad, has been significantly eroded or modified, and there are no valid reasons why especially when it comes to economic development opportunities, tribal sovereign interests should be strictly limited to the reservation setting. The general concept of sovereignty has evolved from a concept focusing uniquely on territorial sovereignty to a more malleable concept recognizing the interrelationship between various sovereign actors. With the advent of the European Union, and the development of cyberspace, and the internet, the very concept of sovereignty has evolved and is being challenged. Under traditional understanding of sovereignty, in order to be sovereign, a state had to have complete and exclusive control of everything within its borders. Under such concept, tribes and states such as Utah, could not be considered sovereign. Today, however, that concept of territorial sovereignty is on the decline, and scholars have recognized that there is more than one conceptual framework for defining sovereignty. In a world where everything is interconnected, largely because of the internet, scholars have moved away from the traditional concepts of territorial sovereignty, to a more malleable concept, that some scholars have called relational sovereignty. In Appendix B which is attached at the end of this statement, I further describe how the United States courts and the Congress have already recognized the validity of tribal sovereign interests beyond the reservation border.

While I believe that because the Supreme Court invalidated parts of IGRA, IGRA no longer incorporates the balance between tribal-state and federal interest sought by Congress when it initially enacted that law, I do believe that any future legislation should

uphold the initial compromise reached in IGRA. I now turn to what were the key provisions of this agreement.

2. THE ESSENCE OF THE BARGAIN REACHED IN IGRA

The dual purpose of IGRA was to recognize gaming as a legitimate activity for economic development on Indian reservations while at the same time ensuring that Indian gaming remained clean and legitimate by not coming under the influence of organized crime. However, the crucial aspect of the legislation was the recognition that the tribes, the states, and the federal government all had legitimate interests relating to gaming on Indian reservations. While the legislation recognized perhaps for the first time that states did have a role to play in the tribal-federal relation, it also recognized that tribes should be incorporated as sovereign governments into our “dual” system federalism. In other words tribes should be integrated as governments into what was before only a federal-state relationship.

With this in mind, what are the essential aspects of IGRA that achieved those goals:

First, one cannot talk about IGRA without mentioning the *Cabazon* Supreme Court decision, the 25th anniversary of which we are celebrating this year. In *Cabazon*, the Court held that states did not have jurisdiction to regulate gaming on Indian reservations although they could prohibit it altogether if the prohibition was applied throughout the state. IGRA incorporated this part of the decision by mandating that states had to negotiate in good faith on any game that was otherwise authorized under state law.

Secondly, IGRA recognized that Tribes could be both operators and regulators of Indian gaming. The very first bill introduced to regulate gaming on Indian reservations was introduced by my former boss, Morris Udall. Under that initial bill, gaming on Indian reservations would have been legal if authorized by a tribal law and approved by the Secretary of the Interior. The tribal law had to meet certain key criteria. One such criteria was that Indian casinos had to be tribally owned. The reason for this was two-fold. First we were aware that many tribes lacked the essential tax base normally enjoyed by any other governments. Tribes, therefore, were badly in need of an additional source of governmental revenues. Secondly, we were also aware that many states had been successful in raising revenues through the operation of state owned lotteries. This indicated that governments, such as tribal governments, could be both gaming operators and regulators. That essential feature of the original Udall Bill was maintained in the final version of IGRA.

Third: maintaining a level playing field. The initial Udall Bill was forcefully criticized by many on Capitol Hill on the ground that Indians would gain an unfair advantage under such legislation. The operative words were that Indians had to be

operating on a “level playing field” with the non-Indian gaming operators. Although initially those who opposed the original Udall bill were thinking of a level playing field between the tribal casinos and the privately owned non-Indian casinos, we on the Udall staff agreed to another type of level playing field and that was between the states as owners and regulators of gaming and Indian tribes as owners and regulators. In the end, it is this kind of level playing field that IGRA incorporated.

3. HOW DO YOU BEST MAINTAIN THE HISTORIC COMPROMISE REACHED IN IGRA AS FIRST ENACTED.

1. Tribes should continue to be recognized as sovereign governments with the authority to regulate gaming occurring on the reservations.
2. Tribes should be able to conduct internet gaming with customers located in any jurisdiction that allows internet gaming even if these customers are not located in the state where the tribe is located.
3. Another part of the agreement reached in IGRA called for no state taxation of tribal gaming revenues. This too should be respected and extended to Internet gaming.
4. To the extent that Internet gaming is not already authorized under existing compacts, Internet gaming should not be treated as Class III but as a new type of gaming activity.
5. There is no reason why Internet gaming, if it is considered a new type of gaming, cannot be regulated jointly by the NIGC and the Indian tribes operating such internet gaming.

A federal court once referred to IGRA as a prime example of “cooperative federalism.” The evolution of congressional legislation in Indian affairs (described in Appendix A) shows a move toward what has been referred to as cooperative federalism-- instead of imposing federal laws, regulations, and programs on tribes directly, more recent legislation call on the federal government to negotiate compacts with the tribes or make federal funds contingent on tribal compliance with federal directives. The goal here should be both to define the role of the state in the federal-tribal trust relationship and integrate the tribes into what was previously a dual federalism comprised of only the states and the federal government. The legislative model selected for tribal internet gaming regulation should represent the best approach for establishing a system some may call cooperative tri-federalism.

One option worth exploring would be for the NIGC and the tribes to follow the informal rule-making model set out in the Administrative Procedure Act, or more likely, in the Negotiated Rulemaking Act of 1990. Under the informal rule-making model, Congress would enact comprehensive legislation outlining general federal requirements

and guidelines which would include protections of legitimate state interests. These federal requirements could be similar to the ones currently contained in IGRA. The Tribes would negotiate with the NIGC to create a gaming compact with the federal government. The legislation would provide for state interests to be represented during these negotiations. The negotiated compact would then be published as a proposed rule in the Federal Register. Interested parties, including the state and local interests, would then have another chance to comment on the proposed compact before it is issued as a final rule in the Code of Federal Regulations. This option would side-stepped the hurdles created by the Supreme Court decision in *Seminole Tribe v. Florida* and re-establish the balance between competing tribal, federal, and state interests that the original IGRA had sought to achieve. I also believe that, as shown in Appendix A, it would be consistent with the evolutionary trend in federal Indian legislation.

APPENDIX A: THE EVOLUTIONARY TREND IN FEDERAL INDIAN LEGISLATION.

The purpose of this section is not to do a comprehensive in-depth analysis of all major congressional legislation affecting Indian affairs, but to analyze the evolution of such legislation, to discern the normative assumptions behind the different models, and to determine which model is best suited for the regulation of tribal Internet gaming and achieving what could be called cooperative tri-federalism: a version of federalism involving the tribes, the federal government, and the states.

Congressional legislation after the treaty period which ended in 1871 can be divided into four eras: The Allotment Era, the Indian Reorganization Era, the Self-Determination Era, and the current period, which could be called the Self-Governance Era.

The first model, the treaty model, was in effect for almost 100 years, much longer if one includes the pre-constitutional colonial period. This period of tribal-federal relationship was mostly defined by the various treaties and the federal role as a trustee was mostly limited to providing whatever was mandated under the various treaties. Even though the Indian nations acknowledged their “dependence” on the United States in many of those treaties, the assumption behind the treaties was that Indian nations were to remain separate and distinct sovereign political entities. Indians were not citizens of the United States and no federal laws, at least initially, extended to Indians within Indian country. The first law extending federal criminal jurisdiction over Indians committing crimes against non-Indians in Indian Country was enacted in 1817.

Things changed drastically after 1871, the year Congress enacted legislation prohibiting the making of any further treaties with Indian tribes. During that period, known as the Allotment Era, the Court recognized state criminal jurisdiction over crimes committed by non-Indians against other non-Indians within Indian country, and the Court

upheld the power of Congress to enact laws, such as the Major Crimes Act, specifically aimed at assuming political control over Indian tribes.

During the Allotment Era, Congress was most interested in assuming control of tribal land and natural resources. The model legislation then was the leasing statutes. These statutes reserved total control to the federal government. Some of the leasing acts did not even require tribal consent, and the Supreme Court upheld the power of Congress to delegate plenary authority to the Secretary of the Interior in the management of tribal natural resources.

The next era came about with the Indian Reorganization Act of 1934 (“IRA”). The IRA’s major goal was to put an end to the allotment policy. The proto-typical statute of this era is the Indian Mineral Leasing Act (“IMLA”). Although tribes obtained more control over their resources, Professor Judith Royster has asserted that “tribes had more authority over resource development on paper than in practice [T]he federal government retained most of the practical decision-making about Indian natural resources development and use.”

Except for a brief time when Congress embraced a termination policy, the next era, the Self-Determination Era, began in the 1970’s. Besides the Indian Self-Determination and Education Assistance Act, perhaps the most important legislation enacted during this era was the Indian Child Welfare Act of 1978 (“ICWA”). Congress also enacted statutes to govern the development of natural resources during the Self-Determination Era, like the Indian Mineral Development Act of 1982 (IMDA). The IMDA allowed tribes to negotiate the terms of their mineral development and enter into new types of arrangements

The final generation of statutes is part of a new era which could be called the Tribal Self-Governance Era. An indicative progression from self-determination to self-governance has been the evolution of the Indian Self-Determination and Education Assistance Act, from an act only allowing tribes to assume the management of federal programs pursuant to a procurement contract type model, to a model based on tribal federal agreements, allowing each tribe to design its own program with its own funding priorities. In the natural resources area, a good example of the evolution from the previous model to the new one is the difference between the Indian Mineral Development Act of 1982 and the Indian Tribal Energy Development and Self-Determination Act of 2005 (ITEDSA). Under the ITEDSA, tribes can enter into Tribal Energy Resource Agreements (TERA’s) with the Secretary of the Interior. Once the agreement is approved by the Secretary, tribes can enter into leases or other agreements concerning development of natural resources with third parties without any additional federal approval requirements.

The process provided for in the ITEDSA shares some similarities with the one adopted in the Tribal Self-Governance Act of 1994. Both acts provide for an initial foundational agreement between a tribe and a federal agency, after which federal controls are diminished and the tribe assumes primacy over the program. Peculiar to the ITEDSA, however, is that at the same time as the federal government releases its daily management and ultimate control over tribal natural resources, the Congress is also giving more of a voice to affected third parties. Thus, under the ITEDSA, the Secretary of the Interior has to request public comments on the final TERA proposal, and has to take such public comments into consideration when deciding whether to approve a TERA. Professor Royster has stated that “[m]any of the public input provisions of the ITEDSA . . . conflict sharply with tribal self-governance.” Other provisions in the Act require tribes to establish environmental review processes providing for public notice and comment, as well as providing consultation with state governments concerning any potential off-reservation impacts. There is also a provision allowing any interested party to petition for Secretarial review of the Tribe's compliance with the TERA.

While the Act does maintain the overall trust relationship between the federal government and the tribes, Professor Royster concluded that “[t]ribes can take advantage of new options and increased practical sovereignty, but in exchange the [federal] government has a deeply discounted trust responsibility.” For instance, while the Secretary has to “act in accordance with the trust responsibility . . . and in the best interests of the Indian tribes,” the Act also provides that “the United States shall not be liable to any party (including any Indian tribe) for any negotiated term of, or any loss resulting from the negotiated terms” of any agreement reached pursuant to an approved TERA.

In some important aspects, both the Self Governance Act and ITEDSA follow the model adopted for the implementation of some of the federal environmental laws, a model which has been described as cooperative federalism. Starting in the mid 1980s Congress did include Indian tribes in legislation such as the Clean Air Act, the Clean Water Act, and the Safe Drinking Water Act, and Congress provided that, for some of the sections and under certain conditions, tribes could be treated as states for the purposes of assuming primacy for the regulation of the environment within their reservations.

APPENDIX B: DOMESTIC LAW RECOGNITION OF TRIBAL SOVEREIGN INTERESTS BEYOND THE RESERVATION

1. Treaties and Agreements with and Among Indian Tribes

Treaties entered between the United States and various Indian tribes have been recognized as confirming hunting and fishing rights to tribes beyond their reservations borders. Such treaties have been held to immunize tribal members from some state regulations. In addition, tribes can enforce tribal regulations of treaty rights on their own

members beyond the reservation. Such tribal regulations may even, in certain cases, preempt state regulations. Usually, however, because tribal treaty rights outside the reservation are said to be held “in common” with the citizens of the state, states have been given concurrent jurisdiction to regulate treaty hunting and fishing rights for the purpose of conservation. Such state regulations have to be reasonable and necessary, and cannot discriminate against Indians exercising their treaty rights.

Although there may be some limitations derived from the Supreme Court's statement that tribes have been divested of the power to “independently . . . determine their external relations,” tribes can and have entered into binding agreements and treaties with other tribes. In addition, tribes can and have entered into compacts with states which have recognized some form of tribal authority over tribal members or exemptions from state power beyond the reservation border. For instance, tribes in Michigan have entered into tax compacts with the state which recognize some tribal exemptions from state taxing authority in “agreement areas.” As stated by professor Matthew Fletcher, “[t]he ‘agreement area’ concept developed over the course of the negotiations in order to smooth over many of the difficulties created by the lack of a clearly designated Indian Country for most Michigan Indian Tribes.” Therefore, according to Professor Fletcher “[f]ew of the lines and boundaries affecting the [tax] exemptions contained in the agreement have any relationship whatsoever to reservation boundaries or Indian Country.”

2. Legislation Recognizing Tribal (Sovereign?) Interests Beyond the Reservation.

I put a question mark after the word sovereign because one of the issues here is whether this section should be written in terms of tribal sovereignty interests or something else: cultural, religious, or socio-political interests. Talking in terms of sovereignty often invites conflicts because sovereignty is connected with an assertion of power, often exclusive power. Framing the discussion about cultural or economic rights, on the other hand, seems less confrontational and more aimed at seeking accommodations. Whether described in term of sovereignty, cultural rights, or just economic rights, the United States Congress has enacted a substantial amount of legislation aimed at protecting such off-reservation tribal interests.

Perhaps the most far reaching legislation recognizing tribal sovereign interests beyond the reservation borders is the Indian Child Welfare Act (ICWA) of 1978. In addition to mandating exclusive tribal court jurisdiction over certain child custody proceedings when the Indian child is domiciled on the reservation, the ICWA allows for concurrent tribal and state jurisdiction in such proceedings for Indian children residing off the reservation. Furthermore, the Act allows for transfer of cases from state to tribal courts in the absence of good cause or objections by either parent. As pointed out by Patrice Kunesh, one section of the ICWA recognized exclusive tribal court jurisdiction over non-reservation Indian children when these children are “wards” of the tribal court. Furthermore,

professor Kunesh also demonstrated that even before the passage of ICWA, some courts had recognized exclusive tribal court jurisdiction in such off reservation child custody proceedings. Having stated that the unique tribal interest in its Indian children “coalesces with the essentiality of tribal governance in child welfare matters, to compose an uber-tribal interest that transcends territorially-defined jurisdictional limits,” professor Kunesh concluded that “[t]he welfare of Indian children lies at the heart of tribal sovereignty. Thus, there are no real boundaries to protecting these essential tribal relations”

Just as was done in the ICWA, Congress has also enacted federal legislation mandating that full faith and credit be given by federal and state courts to certain orders of tribal courts. Examples of such legislation are the Child Support Orders Act, the Violence Against Women Act, the Indian Land Consolidation Act, the National Indian Forest Management Act, the American Indian Agricultural Management Act, and arguably the Parental Kidnapping Act. These statutes are important to the issue being discussed here because their ultimate effect is to extend the sovereign actions of Indian tribes beyond the reservation borders. In addition, as professor Robert Clinton has argued, legislation providing for full faith and credit, rather than comity, more clearly “integrate” Indian tribal courts into Our Federalism on the same par with state and federal courts.

Congress has also enacted amendments to federal environmental statutes such as the Clean Air Act, Clean Water Act, and the Safe Drinking Water Act, providing for treatment of tribes as states (TAS). Such treatment as states allows Indian tribes to extend the reach of their sovereignty beyond the reservation borders. As the Seventh Circuit stated in *Wisconsin v. EPA*, “once a tribe is given TAS status, it has the power to require upstream off-reservation dischargers, conducting activities that may be economically valuable to the state . . . to make sure that their activities do not result in contamination of the downstream on-reservation waters.” The Seventh Circuit also acknowledged that even though “this was a classic extraterritorial effect,” it was not prohibited by the *Oliphant-Montana* line of cases which implicitly divested tribes of the power to independently control their external relations.

Perhaps the most important statute focusing on tribal cultural interests is the Native American Graves Protection Act of 1990 (NAGPRA). Once described as human rights legislation, NAGPRA not only provides for the repatriation of Native American human remains and cultural items in the possession of Federal agencies and museums to the tribes, but also gives certain protections to Native American graves and burial grounds located on tribal and federal lands. Under NAGPRA, if an Indian burial ground is discovered during excavation activities, the appropriate tribes have to be notified. Once a tribe is notified, however, it only has thirty days to decide how to remove, or otherwise make provisions for the disposal of, human remains and cultural items associated with the burial site. After the thirty day period, activities around the site may resume.

Tribal interests in off-reservation sites were also recognized in the 1979 Archeological Resource Protection Act (ARPA) and the 1966 National Historic Preservation Act (NHPA). ARPA prohibits the removal and excavation of “archeological resources” from federal and Indian land without a permit. Under the Act, the appropriate Indian tribe has to be notified if the issuance of a permit could result in harm or destruction to any site, considered as having some cultural or religious importance to that tribe. Under the 1992 amendments to NHPA, federal agencies have to consult with the appropriate tribes if a federal undertaking is likely to affect a historic property of religious or cultural significance to that tribe. However, while consultation allows tribes to be involved in the process, it does not give them a right to veto any federal undertakings.

3. Judicial Recognition

One clear example where tribal immunity from state power has survived even outside the reservation is in the doctrine of tribal sovereign immunity from suit. Thus in *Kiowa Tribe v. Manufacturing Technologies*, the Supreme Court upheld the sovereign immunity of the tribe even though the tribe was being sued over commercial activities which had occurred off the reservation. The majority specifically refused the dissent's invitation to limit the tribe's sovereign immunity to non-commercial tribal affairs occurring on the reservation.

The peculiar situation of Alaskan tribes provides a fertile ground to debate the extent of tribal sovereignty beyond the reservation borders. As a result of the Supreme Court decision in *Alaska v. Native Village of Venetie*, the Native Tribes in Alaska have been described as “sovereigns without territorial reach.” Yet in spite of *Venetie*, the Alaska Supreme Court, in *John v. Baker*, allowed a tribal court jurisdiction over a child custody dispute between tribal members, even in the absence of any Indian country falling under the jurisdiction of that tribe. After stating that “[t]he federal decisions discussing the relationship between Indian country and tribal sovereignty indicate that the nature of tribal sovereignty stems from two intertwined sources: tribal membership and tribal land,” the Alaska Supreme Court held that Alaska Native villages have inherent, non-territorial sovereignty allowing them to resolve domestic disputes between their own members. Although the decision has been criticized, it is now almost ten years old and has not been modified.

The Alaska Supreme Court relied on precedents such as *Wheeler, Montana, Merriion, Fisher, and Iowa Mutual*, to find that under United States Supreme Court jurisprudence, “The key inquiry . . . is not whether the tribe is located in Indian country, but rather whether the tribe needs jurisdiction over a given context to secure tribal self-governance.” Finally, relying on *Kiowa Tribe of Oklahoma v. Manufacturing Technologies*, the Alaskan Court concluded that “Decisions of the United States Supreme

Court support the conclusion that Native American nations may possess the authority to govern themselves even when they do not occupy Indian country.”